

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEEFE KAPLAN MARITIME, INC.

Plaintiff,

No.C05-0314 WDB

v.

**ORDER TO REASSIGN THIS ACTION
AND
REPORT AND RECOMMENDATION RE
MOTION FOR DEFAULT JUDGMENT
AND APPLICATION FOR ORDER FOR
EXECUTION SALE AND RIGHT TO
CREDIT BID**

NIKOLAI TEHIN, and individual, *in personam*,
and the S/V ESCAPADE, Official No. 237297,
and her engines, gear, tackle,
appurtenances, etc., *in rem*

Defendants.

Plaintiff is Keefe Kaplan Maritime, Inc., (“KKMI”), a “full service marine yard.” Verified Complaint for Breach of Contract and Enforcement of Maritime Lien, filed January 24, 2005 (“Complaint”), at ¶3. Defendants are Nikolai Tehin, an individual and the putative owner of a vessel called the S/V Escapade, and the vessel S/V Escapade, Official No. 237297.

Plaintiff alleges that it and defendant Tehin entered a contract for extensive repair work on the S/V Escapade. Complaint at ¶6; Declaration of Paul Kaplan in Support of Plaintiff’s Application for Default Judgment By Court, filed June 27, 2005 (“Kaplan Decl.”) at Ex.1. According to plaintiff, it performed some repair work on the vessel and

1 billed Mr. Tehin for that work, but Mr. Tehin has not paid the balance in full. Complaint
2 at ¶10; Kaplan Decl., at ¶¶8-9.

3 On January 24, 2005, plaintiff filed this action alleging claims for breach of
4 contract and enforcement of statutory lien. KKMI sues Mr. Tehin for breach of contract
5 and seeks a judgment of damages for repair and storage costs, interest thereon, attorneys'
6 fees and litigation costs, and costs incurred operating as the custodian of the vessel
7 following its arrest. Additionally, plaintiff asserts that it has obtained a maritime lien as
8 against the vessel S/V Escapade pursuant to the repair contract and 46 U.S.C. §31342
9 and seeks a judgment, *in rem*, against the vessel for repair and storage costs, interest
10 thereon, and costs incurred as the custodian of the vessel following its arrest.

11 On March 10, 2005, plaintiff served Mr. Tehin with a copy of the Summons and
12 Complaint. See, Declaration of Terence S. Cox in Support of Application for Default
13 Judgment by Court, filed June 27, 2005, ("Cox Decl.") at Ex. 1. Plaintiff also published
14 notice of the action and arrest of the vessel in two newspapers. Cox Decl., at Ex. 2 and
15 3. Defendants have not responded to plaintiff's complaint. In response to plaintiff's
16 application for entry of default, the Clerk of the Court entered default as to defendants
17 on April 13, 2005. On June 27, 2005, plaintiff filed and served its Application for
18 Default Judgment ("Motion"). Defendants also received notice that the Court would
19 conduct a hearing on September 26, 2005, in connection with plaintiff's Motion for
20 Default Judgment and plaintiff's Application for Order Directing Marshal to Conduct
21 Admiralty Execution Sale on Judgment, and for Right to Credit Bid at Vessel Sale, filed
22 August 30, 2005 ("Application"). Proof of Service, serving Mr. Tehin, filed September

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7, 2005.¹ Plaintiff also notified all known potentially interested parties of these proceedings. See, various proofs of service on file.

On September 26, 2005, this Court conducted a hearing in connection with plaintiff's Motion and Application. No appearance was made on defendants' behalf or on behalf of any nonparty. See, Transcript of September 26, 2005, hearing.

Because defendants have not appeared in this action, this Court has not secured consent as required by 28 U.S.C. §636(c). Accordingly, we make the following Report and Recommendation and ORDER the Clerk of the Court to randomly reassign this action to a District Judge.

I. Entry of Default Judgment

Plaintiff moves for entry of default judgment pursuant to F.R.C.P. 55(b), and Admiralty Local Rules 6-1 and 6-2.

A. Default Judgment against Mr. Tehin individually

Plaintiff properly served Mr. Tehin's attorney with notice of this action. Cox Decl., at Ex. 1. Mr Tehin has not responded. The Clerk of the Court entered default against both defendants on April 13, 2005. Accordingly, we RECOMMEND that the District Judge to whom this case is reassigned find that plaintiff is entitled to entry of default judgment against Mr. Tehin, individually. We describe in a subsequent section the content that we recommend this judgment include.

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¹The hearing was originally scheduled for August 1, 2005. At plaintiff's request, that hearing was continued to August 16, 2005, to provide time to serve a potentially interested party. Plaintiff then sought to continue the hearing a second time in order to perfect notice to potentially interested parties and to serve Mr. Tehin directly. The Court continued the August 16th hearing to September 26, 2005. See, Order for Supplemental Briefing and re Request to Shorten Time for Application for Sale and Right to Credit Bid, filed August 23, 2005.

B. Default Judgment against S/V Escapade *in rem*

Admiralty Local Rule 6-2 states that,

Default will be entered upon a showing that:

- (a) Notice has been given as required by Admir. L.R. 6-1;
- (b) The time to answer has expired, and
- (c) No one has filed a verified statement of right or interest in the property.

1. Notice

In order to obtain default judgment in an action *in rem* Admiralty Local Rule 6-1(a) requires plaintiff to provide notice of the action and arrest of the vessel:

- (1) By publication as required in F.R.Civ.P. Supp. C(4);
- (2) By service upon the master or other person having custody of the property; and
- (3) By service under F.R.Civ.P. 5(b) upon every other person who has not appeared in the action and is known to have an interest in the property.

Plaintiff has provided adequate notice of this action and of the arrest of the vessel. First, plaintiff placed a notice of this action in The Recorder, a newspaper designated by this Court for the provision of notice about an arrest of a vessel. Admiralty L.R. 4-2(a) and Civil L.R. 77-4(c)(1); Cox Decl., at Ex. 2 and 3.² Second, Mr. Tehin, the owner of the vessel, was personally served, through his attorney, with the Complaint and documents reflecting arrest of the vessel. Cox Decl., at Ex. 1. Finally, plaintiffs properly served copies of the Complaint and notice of the arrest of the vessel, as well as additional documents filed in this action, on each of the nonparties known to plaintiff to potentially have an interest in the vessel, including Wells Fargo Bank, Pamela Stevens, Jim Queeny, and the State Board of Equalization. Cox Decl., at Ex. 4; various proofs of Service on file.

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²Notice was also provided in the West County Times. Because notice via The Recorder is legally sufficient, we make no finding as to whether the West County Times constitutes a newspaper of "general circulation."

1 **2. Time to Answer**

2 The time to answer has expired. Defendants have filed no answer.

3
4 **3. Claims of Interest**

5 Each of the potentially interested nonparties was served with notice of the
6 proceedings generally and was served with notice of the September 26, 2005, hearing
7 and their opportunity to respond to plaintiff's motions. None of the potentially interested
8 nonparties filed a claim of interest. Nor did any appear at the hearing.

9 Accordingly, we RECOMMEND that the District Judge to whom this case is
10 reassigned find that plaintiff has satisfied the requirements of the Admiralty Local Rules
11 for obtaining default judgment against the vessel *in rem*.

12 Next, we determine plaintiff's damages.

13
14 **II. Damages**

15 Plaintiff seeks two judgments. Plaintiff seeks judgment against Mr. Tehin,
16 individually, pursuant to the contract for repair and storage costs, prejudgment interest
17 thereon, *custodia legis* expenses, attorneys' fees and litigation costs. Plaintiff also seeks
18 judgment against the vessel, *in rem*, based on a statutory maritime lien for repair and
19 storage costs, prejudgment interest thereon, and *custodia legis* expenses.

20
21 **A. Special Circumstances Affecting Entitlement to Prejudgment Interest**

22 Plaintiff seems to seek prejudgment interest on the cost of storing the vessel only
23 through January 25, 2005, apparently on the theory that interest is not normally ordered
24 on *custodia legis* expenses. In this case, however, the plaintiff entity bore all the storage
25 and *custodia legis* expenses from the outset and will continue to bear those costs through
26 the entry of the final judgment. In that setting, we see no principled reason, in the
27 exercise of our equity power, not to award prejudgment interest on the *custodia legis*
28 expenses as actually incurred.

1 **B. Judgment against Mr. Tehin**

2 Plaintiff and Mr. Tehin entered a contract for repair work. See, Kaplan Decl., at
3 Ex. 1. In that contract Mr. Tehin accepted liability for repair costs and storage relating
4 to the S/V Escapade and agreed to pay a finance charge of 18% per annum, attorneys’
5 fees, court costs, Marshal’s seizure fees, and custodial fees in the event of a lawsuit or
6 arrest of the vessel resulting from nonpayment. See, Kaplan Decl., Ex. 1 at p. 2.

7 Mr. Tehin breached the agreement by failing to pay for the repair work, requiring
8 plaintiff to initiate these legal proceedings. Kaplan Decl., at ¶ 8-9. Accordingly, we
9 RECOMMEND that the District Court enter judgment in the amount \$133,670.13
10 against Mr. Tehin, individually, for repair costs and storage/*custodia legis* expenses
11 through August 31, 2005, plus prejudgment interest at the rate of 18% per annum. We
12 also RECOMMEND that the District Court enter judgment against Mr. Tehin in the
13 amount \$17,138.09 for attorneys’ fees and costs. See, Kaplan Decl., at Ex. 2 and 3;
14 Plaintiff’s Supplemental Brief in Response to Court Order Dated August 23, 2005, filed
15 August 31, 2005, (“Supp. Brief”) at Ex. D.

16 The storage costs include the cost of storage through January 25, 2005, under the
17 contract, and then *custodia legis* expenses from January 26, 2005, through August 31,
18 2005.³ Supp. Brief, at Ex. D. Plaintiff’s counsel represented that the amount charged
19 to house and protect the vessel is the same whether labeled “storage” or “*custodia legis*.”
20 See, Transcript of September 26, 2005, hearing. Plaintiff also asks that any judgment
21 against Mr. Tehin include \$153.30 per day from September 1, 2005, through the date of
22 entry of the judgment for continuing *custodia legis* expenses. Supp. Brief, at Ex. D; Cox
23 Decl., at 21; Kaplan Decl., at 14-15. We RECOMMEND that the District Court grant
24 plaintiff’s request for an additional \$153.30 per day from September 1, 2005, through
25

26 ³On the record at the September 26, 2005, hearing, plaintiff indicated that general
27 storage costs became “*custodia legis*” on January 27, 2005. Based on the papers submitted
28 by plaintiff, this date actually appears to be January 26, 2005. The distinction is irrelevant
however, because the costs is the same whether labeled “storage” pursuant to the contract or
“*custodia legis*.”

1 the date the District Court enters judgment plus prejudgment interest at the rate of 18%
2 per annum.

3 The recommended judgment includes prejudgment interest charged at the contract
4 rate of 18% per annum. Kaplan Decl., at ¶12; Supp. Brief, at Ex. D. To the extent that
5 it is within the Court's discretion to set the applicable rate of prejudgment interest based
6 on the equities of the case, we RECOMMEND that the District Court apply the
7 contractual rate of 18%. Mr. Tehin was a practicing attorney and freely agreed to this
8 contract provision. Moreover, because defendant has defaulted on the contract, the
9 equities clearly favor plaintiff's interests as opposed to defendant Tehin's.

10 The recommended judgment includes an award of attorneys' fees and costs in the
11 amount \$17,138.59. Cox Decl., at ¶18. The contract entitled the "prevailing party" in
12 litigation to recover reasonable attorneys' fees and costs. Kaplan Decl., at Ex. 1. If the
13 District Court adopts our recommendation and enters judgment in plaintiff's favor and
14 against Mr. Tehin, plaintiff will be the "prevailing party," entitling it to recover
15 reasonably incurred attorneys' fees and costs. We RECOMMEND that the District Court
16 find that plaintiff's fee request is reasonable.

17 Plaintiff seeks reimbursement for work conduct by Messrs. Cox, Hansen and
18 Schwartz at the rates of \$375, \$360, and \$190 per hour. Cox Decl., at ¶19. Mr. Hansen
19 elaborated on the attorneys' levels of experience at the September 26, 2005, hearing.
20 See, Transcript. Based on this Court's experience with matters such as this, plaintiff's
21 counsel's billing rates are commensurate with the prevailing market rate in the Bay Area
22 for lawyers of counsel's skill and experience.⁴

23 Additionally, we have reviewed counsel's billing statements in this matter and
24 RECOMMEND that the District Court find that the kinds of tasks conducted by counsel

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26 ⁴Max L. Kelly, Esq., also appeared at the hearing on plaintiff's behalf. It does not
27 appear that plaintiff's fee request currently includes time billed by Mr. Kelly. See, Cox
28 Decl., at Ex. 7. Mr. Kelly represented on the record that his billing rate is \$205 per hour.
Based on Mr. Kelly's representations about his experience we find that his rate is
commensurate with the prevailing market rate in the Bay Area for lawyers of his skill and
experience who perform the kind of work undertaken in this action.

1 were reasonably undertaken and that counsel expended a reasonable number of hours
2 completing these tasks. See, Cox Decl., at Ex. 7.

3 Finally, we reviewed plaintiff's request for costs. The items for which
4 reimbursement are sought constitute taxable costs and/or constitute out-of-pocket
5 expenses normally chargeable to the client. Cox Decl., at ¶18; Cox Decl., at Ex. 7. For
6 that reason, we RECOMMEND that the District Court grant plaintiff's request for
7 litigation costs.

8 9 **C. Judgment against the Vessel S/V Escapade**

10 Plaintiff seeks judgment against the S/V Escapade, *in rem*, pursuant to the repair
11 contract and 46 U.S.C. §31301 & §31342(a). Cox Decl., at ¶17; Transcript of September
12 26, 2005, hearing. Section 31342(a) states:

13 [A] person providing necessities to a vessel on the order of the owner . .
14 . (1) has a maritime lien on the vessel; [and] (2) may bring a civil action in
rem to enforce the lien.

15 "Necessaries include repairs, supplies, towage, and use of dry dock or marine
16 railway." 46 U.S.C. §31301. The statute's list, however, is

17 not exhaustive, and in fact, modern admiralty jurisprudence interprets
18 "necessaries" broadly, as anything that facilitates or enables a vessel to
perform its mission or occupation. The term "necessaries" includes most
19 goods or services that are useful to the vessel and keep her out of danger."
"Necessaries" indubitably include the things a prudent owner would
20 provide to enable a ship to perform her particular function.

21 *Ventura Packers*, 305 F.3d 913 (9th Cir. 2002) internal citations omitted (emphasis
22 added).

23 Repair costs are recoverable pursuant to the clear language of the statute. We
24 RECOMMEND that the District Court also find that storage, *custodia legis* expenses,
25 and prejudgment interest all satisfy the broad definition of "necessaries" recoverable
26 pursuant to plaintiff's maritime lien. *Accord, In re Buholm Fisheries, Inc.*, 308 B.R. 491
27 (W.D. WA 2003) (prejudgment interest is sufficiently part of the underlying
28 "necessaries" to be recoverable on a maritime lien).

Moreover, courts routinely award prejudgment interest in maritime cases. We recommended that the District Court use the contract rate with respect to prejudgment interest accruing against Mr. Tehin. However, Admiralty L.R. 6-3 provides that, “unless a judge directs otherwise,” the rate of prejudgment interest on default judgment for an action *in rem* is that provided by 28 U.S.C. §1961. We see no reason to depart from this Court’s Local Rule with respect to the *in rem* judgment. Therefore, we RECOMMEND that the District Court award prejudgment interest as against the vessel at the rate specified by 28 U.S.C. §1961 at the time judgment is entered.

For the reasons stated above, we RECOMMEND that the District Court enter judgment in plaintiff’s favor and against the vessel S/V Escapade *in rem* in the amount \$133,670.13, for repair costs and storage/*custodia legis* expenses through August 31, 2005. We further RECOMMEND that the District Court award prejudgment interest at the rate specified by 28 U.S.C. §1961. We also RECOMMEND that the District Court award plaintiff additional *custodia legis* expenses in the amount \$153.30 per day from September 1, 2005, through the date of entry of judgment, as well as statutory interest thereon.

III. Application for Order of Sale

Plaintiff seeks an order directing the marshal to conduct an execution sale of the vessel S/V Escapade. See, Application. We RECOMMEND that the District Court grant plaintiff’s request on the condition that plaintiff publish notice of the sale in The Recorder **and** The San Francisco Chronicle within the time frame provided by Admiralty Local Rule 9-2.

Admiralty L.R. 9-2(c) provides that the marshal must make report of the sale to the Court and that, absent a contrary order, if no written objection is filed within 3 days the sale shall stand confirmed as of course. Because it is unlikely that there will be a

1 significant market for the vessel,⁵ and because there is a substantial likelihood that
2 plaintiff will obtain the vessel via a credit bid (see *infra*), we RECOMMEND that, in lieu
3 of the procedure described in Admiralty L.R. 9-2(c), the District Court require plaintiff
4 to apply to the Court for approval of the sale immediately following its conclusion and
5 that the sale not be “final” until confirmed by the Court.

6 We further RECOMMEND that the District Court refrain from determining the
7 amount of any deficiency judgment against Mr. Tehin until such time as the Court has
8 confirmed the sale of the vessel. At that time, the Court will be better positioned to
9 determine whether to offset the judgment against Mr. Tehin by the sale price or by the
10 fair market value of the vessel. See, *Bollinger and Boyd Barge Service, Inc., v. Motor*
11 *Vessel, Captain Claude Bass*, 576 F.2d 595 (5th Cir. 1978); *Enserco, L.L.C. v. Drilling*
12 *Rig Noram*, 126 F.Supp.2d 443 (S.D. TX 2000).

13 14 **IV. Right to Credit Bid**

15 Admiralty L. R. 9-2(b) permits a creditor to credit bid as long as it files and serves
16 an affidavit, swearing to the amount of the secured indebtedness, on all parties no later
17 than ten days prior to the date of sale. We RECOMMEND that the District Court grant
18 plaintiff’s request for permission to credit bid at the execution sale up to the amount of
19 the judgment entered against the vessel *in rem* on the condition that plaintiff file and
20 serve an affidavit as provided by Admiralty L.R. 9-2(b).

21 22 **V. Conclusion**

23 The undersigned hereby ORDERS the Clerk of the Court to randomly reassign this
24 action to a District Judge.

25 We RECOMMEND that the District Judge to whom the Clerk reassigns this matter
26 grant plaintiff’s request for entry of default judgment in favor of plaintiff and against

27 _____
28 ⁵See, Appraisal attached to Declaration of Max L. Kelly in Support of Supplemental
Briefing in Response to Court Order Dated August 23, 2005, filed September 9, 2005.

1 Nikolai Tehin, *in personam*, for (1) repair costs and storage/*custodia legis* expenses
 2 through August 31, 2005, in the amount \$133,670.13, (2) *custodia legis* expenses from
 3 September 1, 2005, through entry of judgment at the rate of \$153.30 per day, (3)
 4 prejudgment interest on the items in (1) and (2) at the contract rate of 18% per annum,
 5 and (4) attorneys' fees and costs in the amount \$17,138.09.

6 We RECOMMEND that the District Judge to whom the Clerk reassigns this matter
 7 grant plaintiff's request for entry of default judgment in favor of plaintiff and against the
 8 vessel S/V ESCAPADE *in rem* for (1) repair costs and storage costs through August 31,
 9 2005, in the amount \$133,670.13, (2) *custodia legis* expenses incurred from September
 10 1, 2005, through the date of entry of judgment at the rate of \$153.30 per day, and (3)
 11 prejudgment interest on the items in (1) and (2) at the rate established by 28 U.S.C.
 12 §1961.

13 We also RECOMMEND that the District Court order the marshal to conduct an
 14 execution sale of the vessel and permit plaintiff to credit bid at the sale up to the amount
 15 of plaintiff's judgment *in rem* on the conditions stated herein, and that the District Court
 16 determine the amount by which to offset the judgment against Mr. Tehin following
 17 confirmation of the sale.

18 PLAINTIFF MUST IMMEDIATELY SERVE A COPY OF THIS REPORT AND
 19 RECOMMENDATION ON DEFENDANTS and ALL KNOWN POTENTIALLY
 20 INTERESTED PARTIES.

21 IT IS SO REPORTED AND RECOMMENDED.

22 Dated: September __, 2005

23 /s/ Wayne D. Brazil
 WAYNE D. BRAZIL
 United States Magistrate Judge

24 copies e-mailed to:
 parties of record,
 25 cc: District Judge, Clerk,
 wdb, stats

26
 27 counsel for plaintiffs to
 28 serve on defendants